SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
APR 30 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 921

UNITED STATES PIPE AND FOUNDRY COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DOUGLAS ARANT,
2100 Comer Building,
Birmingham 3, Alabama,
JOHN J. COLEMAN, JR.,
2100 Comer Building,
Birmingham 3, Alabama,
Counsel for Petitioner.

Of Counsel:
E. L. ALL,
THOMAS W. THAGARD, JR.,
WHITE, BRADLEY, ARANT, ALL & ROSE,
2100 Comer Building,
Birmingham 3, Alabama.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX

	Page
Prayer	1
Opinion below	2
Jurisdiction	2
Question presented	2
Statute involved	2
Statement of the case	3
Reasons for granting the writ	6
A. The Decision of the United States Court of Appeals for the Fifth Circuit Conflicts with the Decisions of Other United States Courts of Appeals	6
B. Administrative Problems Created by the Decision of the United States Court of Appeals for the Fifth Circuit	13
Conclusion	15
Appendices:	
A. Opinions of the United States Court of Appeals for the Fifth Circuit	17
B. Decision and Order of the National Labor Relations Board	31
C. Intermediate Report of the Trial Examiner	33
D. Statutes Involved	41

TABLE OF CITATIONS.

Cases.

Arlington Asphalt Co., 136 NLRB No. 67 (March 30, 1962), 49 LRRM 1831 at 1833	12

Continental Baking Co., 99 NLRB 777 (1952) 11

Douds v. International Longshoremen's Ass'n., 241 F. 2d 278 (2d Cir. 1957), affirming 147 F. Supp. 103 (S. D. N. Y. 1956) 6, 7, 9, 14

International Bhd. Elec. Workers (Texlite, Inc.), 119 NLRB 1792 (1958), enforced mem., 266 F. 2d 349 (5th Cir., 1959) 7, 9

International Bhd. of Longshoremen (Chicago Stevedoring), 125 NLRB 61 (1959), order enforced in pertinent part, 286 F. 2d 661 (7th Cir., 1961) 7, 9

International Longshoremen's Ass'n. (New York Shipping), 118 NLRB 1481 (1957), enforcement denied because of settlement, 277 F. 2d 681 (D. C. Cir., 1960) 6, 9

NLRB v. Borg-Warner, 356 U. S. 342 at 350 (1958) ..6, 13

NLRB v. Insurance Agents International, 361 U. S. 477, 507 (1960) 11

NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45 (1937) 12

NLRB v. Pittsburgh Plate Glass Company, 270 F. 2d 167 (4th Cir., 1959) 10

Painters' Union, Local 164 (Cheatham Painting Company), 126 NLRB 997 (1960), enforced 293 F. 2d 133 (D. C. Cir.); cert. denied 368 U. S. 824 (1961) .. 7, 9

United States Pipe and Foundry Company v. NLRB, 298 F. 2d 873, 874 ..... 5, 8

Westinghouse Elec. Corp., 122 NLRB 1466 (1959), order enforced sub. nom., I. U. E. v. NLRB, 273 F. 2d 243 at 246, f. n. 6 (3rd Cir., 1959) 7, 9

Statutes.

National Labor Relations Act, as amended:
Section 8 (b) (3), [29 U. S. C., § 158 (b) (3)] 2
Section 9 (a), [29 U. S. C., § 159 (a)] 2

Section 9 (b), [29 U. S. C., § 159 (b)] 2
Section 9 (c), [29 U. S. C., § 159 (c)] 2
28 U. S. C., § 1254 (a) 2

Miscellaneous.

Gregory, Labor and the Law, (2d. Rev. Ed., 1958) at 144 10
House Rep. No. 245, National Labor Relations Board, Legislative History of the Labor-Management Relations Act of 1947, pp. 310-11 12
NLRB, Fourteenth Annual Report (1949) at pp. 32-33 10
NLRB, Thirteenth Annual Report (1948) at pp. 35-36 10
Taplitz, Refusal to Bargain, N. Y. U. Seventh Annual Conference on Labor, at 231 10

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. .....

UNITED STATES PIPE AND FOUNDRY COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America.

Petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit to review a decision of that Court issued on February 1, 1962, affirming an order and decision of the National Labor Relations Board rendered against Petitioner.

OPINION BELOW.

The majority (R. 207-217)[1] and dissenting (R. 217-221) Opinions of the United States Court of Appeals are reported at 298 F. 2d 873 and are printed as Appendix A to this Petition. The Decision of the National Labor Relations Board (R. 46-47) and the Intermediate Report of the Trial Examiner (R. 35-44) are reported at 129 NLRB 357; and are included as Appendix B and Appendix C, respectively, to this Petition.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (a) of the National Labor Relations Act, as amended.

QUESTION PRESENTED.

Whether a union, the certified representative of a plant bargaining unit, may require of an employer as a condition to its agreement that its contract and all contracts under negotiation between the employer and other certified representatives of different bargaining units at other plants shall expire upon a common date.

STATUTE INVOLVED.

The following provisions of the National Labor Relations Act, as amended, are directly involved in this Petition: Section 8 (b) (3) (29 U. S. C. § 158 (b) (3)); Section 9 (a) (29 U. S. C. § 159 (a)); Section 9 (b) (29 U. S. C. § 159 (b)); and Section 9 (c) (1) (29 U. S. C. § 159 (c) (1)) and are reproduced as Appendix D hereto.

---

[1] The symbol "R" designates references to the Transcript of Record in this case as certified to this Court by the Clerk of the United States Court of Appeals for the Fifth Circuit on February 27, 1962.

STATEMENT OF THE CASE.

Petitioner distributes and sells, *inter alia*, cast iron pressure pipe which it manufactures at the following plants, among others: Burlington, New Jersey (Burlington Plant); Bessemer, Alabama (Bessemer Plant); and Birmingham, Alabama (North Birmingham Plant).

Local Union No. 2140, United Steelworkers of America at the Bessemer Plant;[2] Local Union 256, International Brotherhood of Molders and Foundry Workers of America at the North Birmingham Plant;[3] and Local Union No. 2026, United Steelworkers of America at the Burlington Plant,[4] have represented separate and distinct bargaining units of production and maintenance employees for many years, pursuant to certificates issued under Section 9 of the National Labor Relations Act in the early 1940's.

The present proceedings arise from complaints issued by General Counsel for the National Labor Relations Board upon unfair labor practice charges filed by Petitioner against the Unions at the Birmingham and Bessemer Plants (R. 21-27).[5] The complaints which charged the Unions with a continuing failure to bargain in good faith with Petitioner were based upon the fact that each Union insisted as a condition to its agreement with Petitioner that Petitioner agree to provide in such contract a term expiring on a date common to the term of each of the col-

---

[2] Board Case No. R-1651 (21 NLRB 671).

[3] The Molders were first certified at this plant in April 1940 in Board Case No. 10-R-266 (unreported). Three years later in a representation proceeding initiated by another union (49 NLRB 625), the Molders won the election and were recertified.

[4] Board Case No. 4-R-988 (unreported).

[5] Local Union 2026 at Burlington is not in the geographic area comprising the Tenth Region of the Board and was not named as a party to this case.

lective bargaining agreements under negotiation between Petitioner and the other certified representatives at the other plants (R. 40-41). They were issued on the conception that the demand for common termination dates, i. e., a demand by one certified representative of a bargaining unit that an employer reach a particular result in negotiations with a different certified representative of a separate and distinct bargaining unit, is tantamount to bargaining for employees outside the bargaining unit which the union making the demand represents (R. 42).

During the period beginning with their respective certifications and ending in 1959, each of the Unions, pursuant to negotiations separately conducted, entered into a number of successive collective agreements with the Company relating only to the bargaining unit for which such union had been certified (R. 150).

On August 14, 1959, the Steelworkers International Union demanded of Petitioner by letter "joint negotiations between your Company and other labor organizations for a master agreement covering all production workers" (R. 203). That demand in the form presented was subsequently dropped and substituted in its stead was a demand for common termination for the contracts being separately negotiated at the Bessemer, Alabama, Burlington, New Jersey and North Birmingham, Alabama Plants (R. 149, 167, 168). Meanwhile the Molders Union, in its negotiations with Petitioner at the North Birmingham Plant, instituted and insisted upon a similar demand as a condition to its agreement (R. 110, 111, 112, 114, 115; 120). Petitioner's refusal to accede to these demands resulted in an impasse in the negotiations at the three plants (R. 38, 39, 40).

Petitioner's charges against the Unions were filed on February 17, 1960; the ensuing complaints were issued by

General Counsel on March 22, 1960 (R. 27) and a hearing was held before a Trial Examiner of the Board on May 4, 1960 (R. 36).

The Trial Examiner heard the evidence adduced by General Counsel on the common expiration date demands but ruled that such demands on the part of the unions were permissible as a matter of law and recommended dismissal of the charges (R. 41-44, App. C).

The Board thereafter sustained the ruling of the Trial Examiner in "an extremely brief decision" which "refused to consider the grounds upon which the Trial Examiner based his decision." *United States Pipe and Foundry Company v. NLRB*, 298 F. 2d 873, 874 (R. 209, App. A). The Board thereby "misconceived the issue presented"[6] 298 F. 2d 873, 874 (R. 210, Appendix A) and disposed of the case without reaching the question presented by this Petition.

On Petition for Review the United States Court of Appeals for the Fifth Circuit, composed of Chief Judge Rives, Circuit Judge Wisdom and District Judge Carswell, affirmed by a majority of the Court. District Judge Carswell vigorously dissented. 298 F. 2d 873, 878 (R. 217, Appendix A).

The opinion of the majority, although recognizing that "strong legal objections can be raised to a union's demand that the employer agree with it and another union or unions for a common expiration date as to two or more

---

[6] The factual predicate for the Trial Examiner's disposition of this case was his finding that the demands in question were for *common termination dates* (R. 43, App. C). The Board, however, adjudicated this case on the apparent belief that the unions' demands involved *specific expiration dates*. Since contract duration, *ipso facto*, is a mandatory item of bargaining, the Board reasoned that the demands for specific expiration dates were also mandatory. (R. 47, f. n. 1, Appendix B).

contracts,'' 289 F. 2d 873, 874 (R. 209),[7] concluded that the demands were valid and that the Board's order ''as distinguished from its reasoning'' 289 F. 2d 873, 878 (R. 11, Appendix A) was correct.

REASONS FOR GRANTING THE WRIT.

A. The Decision of the United States Court of Appeals for the Fifth Circuit Conflicts with the Decisions of Other United States Courts of Appeals.

In *NLRB v. Borg-Warner*, 356 U. S. 342 (1958), this Court enunciated the principle that a party may not insist, as a condition of agreement, on a bargaining proposal which contravenes the underlying policies of the Act. Acting on this principle, the United States Courts of Appeals have applied the rule that a union may not bargain, to the point of impasse, on a proposal relating to the terms and conditions of employment of employees *outside* the bargaining unit which the union represents.[8] They

---

[7] The Court, pointing out the differences between specific and common expiration dates, declared, 298 F. 2d 873, 874 (R. 209-210, App. A):

"The two questions are not identical either legally or actually . . . . Actually, in practical operation, an employer might accede to a union's request for a specific expiration date for its contract, but then adamantly, and perhaps successfully, resist the demand of another union for the same expiration date for its contract. In that event, the specific insistence of the first union would be met, but its real purpose and object would be defeated. . . ."

[8] *Douds v. International Longshoremen's Ass'n.*, 241 F. 2d 278 (2d Cir. 1957), *affirming* 147 F. Supp. 103 (S. D. N. Y. 1956), (sustaining the issuance of a § 10 (l) injunction and condemning a demand which would require the employer to bargain in a coast-wide unit rather than in the small unit for which the union had been certified); *International Longshoremen's Ass'n., (New York Shipping)*, 118 NLRB 1481 (1957), *enforcement denied because of settlement*, 277 F. 2d 681 (D. C. Cir., 1960), (denouncing the same demand condemned by the Second Circuit in *Douds v. International Longshoremen's Ass'n.*, *supra*, and expressly adopting the rationale of the Second Circuit); *Westinghouse Elec. Corp.*,

have reasoned that the Act charges the National Labor Relations Board, and not the antagonists in a labor dispute, with the primary responsibility for determining questions which relate to the extent and scope of the bargaining unit. Hence, prolonged attacks on Board certifications should be conducted before the Board and not at the bargaining table.

This important distinction between "private bargaining over conditions of employment and administrative determination of the unit appropriate for bargaining"[9] is well stated by the United States Court of Appeals for the Second Circuit in *Douds v. International Longshoremen's Ass'n*, 241 F. 2d 278, 282-83, viz.:

> ". . . The parties cannot bargain meaningfully about wages, or hours, or conditions of employment, unless they know the unit of bargaining. That question is for the Board to decide on a petition under Section 9 (c) of the Act, and its decision is conclusive on the parties (case citations) although the decision may subsequently be changed.

---

122 NLRB 1466 (1959), *order enforced sub. nom. I. U. E. v. N.L.R.B.*, 273 F. 2d 243 at 246, f. n. 6 (3rd Cir., 1959), (sustaining an employer's refusal to negotiate about company-wide application of a stock purchase plan with a union which represented only a part of his employees); *International Bhd. of Longshoremen (Chicago Stevedoring)*, 125 NLRB 61 (1959), *order enforced in pertinent part*, 286 F. 2d 661 (7th Cir., 1961), (condemning a union's insistence on a proposal which required an employer to exact an assurance from another employer that his stevedoring work would be given to the union); *International Bhd Elec. Workers (Textile, Inc.)*, 119 NLRB 4702 (1958), *enforced mem.*, 266 F. 2d 349 (5th Cir., 1959), (denouncing an assignment of work clause directed at work outside the jurisdiction of the bargaining unit which the union represented); see also *Painters' Union, Local 161 (Cheatham Painting Company)*, 126 NLRB 907 (1960), *enforced* 293 F. 2d 133 (D. C. Cir.), *cert. denied* 368 U. S. 824 (1961), (condemning a demand fixing residence requirements for jobs outside the jurisdiction of the bargaining unit; this issue was not raised by the union on petition for review to the D. C. Circuit).

[9] *Douds v. International Longshoremen's Ass'n.*, 241 F. 2d 278, 282.

"The machinery for initial decision and subsequent change is provided in the statute. On a petition by an employer, an employee, or a labor organization under Section 9 (c), the Board decides after a hearing what the appropriate bargaining unit is . . . .

The process of change not permitted by the Act is one that denies the Board this ultimate control of the bargaining unit and disrupts the bargaining process itself. This is precisely what occurs when, after the Board has decided what the appropriate bargaining unit is, one party over the objection of the other demands a change in that unit. Such a demand interferes with the required bargaining 'with respect to rates of pay, wages, hours and conditions of employment' in a manner excluded by the Act. It is thus a refusal to bargain in good faith within the meaning of Section 8 (b) (3)."

In the case *sub judice*, the United States Court of Appeals for the Fifth Circuit acknowledged the existence of this well settled rule[10] but refused, by majority vote, to apply it. Holding that the demands for common expiration dates were mandatory,[11] the majority posited its deci-

---

[10] *United States Pipe and Foundry Co. v. NLRB*, 298 F. 2d 873 (1962). (R. 207, Appendix A). The Court declared, 298 F. 2d at 877 (R. 214-15, Appendix A):

". . . A further limitation of the scope of mandatory bargaining is implicit in the authority of the Board to decide upon the appropriate bargaining unit, and in each union's position as the exclusive representative of all employees in such unit: [quoting § 9 (a) and § 9 (b) of the Act].

* * * * * * * *

"Under varying facts and circumstances, it has been often held that a proposal to expand the scope of the bargaining unit itself is not within the area of mandatory bargaining. [citing cases]"

[11] The majority opinion cited no cases to support its reasoning and failed to articulate the considerations of policy which it apparently assumed would justify the disregard of express provisions of the Act which vest in the Board the sole authority to determine the extent and scope of appropriate bargaining units.

sion, in part upon a determination that the demands were the result of an earlier agreement of all the unions affected[12] and in part upon the conception that the demands were motivated by the unions' desires to augment their power at the bargaining table.[13] In so doing, the majority

---

[12] 208 F. 2d at 877-78, (R. 216, Appendix A). The majority also employed this ground to distinguish those cases which had applied the general rule. The Court's reliance on this ground as a measure of distinction is misplaced, for in four of those cases, i. e., *Douds v. International Longshoremen's Ass'n.*, 241 F. 2d 278 (2d Cir., 1957), *International Longshoremen's Ass'n. (New York Shipping)*, 118 NLRB 1481 (1957), *Painters' Union, Local 161 (Cheatham Painting Company)*, 126 NLRB 997 (1960), and *Westinghouse Elec. Corp.*, 122 NLRB 1400 (1959), *order enforced sub nom. I. U. E. v. NLRB*, 273 F. 2d 243 at 246, fn. 6 (3d Cir., 1959), no other union was involved.

[13] 208 F. 2d at 878, (R. 216, Appendix A). The Fifth Circuit likewise distinguished on this ground the cases applying the general rule. But contrary to the assertion of the Fifth Circuit, the proposal condemned in all the cases which it distinguished, did indeed affect the "ability" of the unions to bargain. The purpose of the proposal condemned in *Douds v. International Longshoremen's Ass'n.*, 241 F. 2d 278, (2d Cir., 1957), and *International Longshoremen's Ass'n. (New York Shipping)*, 118 NLRB 1481 (1957), was precisely the same as that of the demand for common termination dates, because it would have enabled the unions in all ports to engage simultaneously in concerted activity, i. e., to strike at the same time. In the words employed by the Fifth Circuit in the case *sub judice*, 208 F. 2d at 877, (R. 216, Appendix A), it would have eliminated the necessity of the New York union's "bail[ing] with a sieve" while the employers shifted their operations to ports which at that time did not fall within the jurisdiction of the New York bargaining unit. Likewise, the work assignment clauses condemned in *International Bhd. of Longshoremen (Chicago Stevedoring)*, 125 NLRB 61 (1959), *order enforced in pertinent part*, 286 F. 2d 661 (7th Cir., 1961) and *International Bhd. of Elec. Workers (Textile Inc.)*, 119 NLRB 1792 (1958), *enforced mem.*, 266 F. 2d 349 (5th Cir., 1959), would have enlarged the unions' bargaining power, for they would have enabled the unions to call even more employees out on strike and to impede production to an even greater extent. Similarly, the residence proposal, denounced in *Painters' Union, Local 161 (Cheatham Painting Company)*, 126 NLRB 997 (1960), *enforced* 293 F. 2d 133 (D. C. Cir.), *cert. denied* 368 U. S. 824 (1961), had the avowed purpose "to prevent the company from undercutting wages, hours

presupposes the existence of policies inconsistent with those which the Act contains.

There is no policy in the Act enabling unions, whatever their purpose, to disregard or ignore Board determinations of what is an appropriate bargaining unit. *First*, the courts and the Board have long held that the desires of employees are not determinative of what is an appropriate bargaining unit, for such desires cannot necessarily be equated with that industrial peace or stability which the bargaining unit is designed to promote.[14] By the same token, it is inconceivable that the desires of a union, or of several unions acting together, should be determinative of whether a unit, already established, may be ignored. *Secondly*, the Act contains no policy encouraging the ag-

---

and employment conditions in other areas." 126 NLRB at 1002. It was clearly designed to augment the unions' bargaining power, for the stabilization of conditions of employment affords a union the assurance that, regardless of the concessions which it exacts from an employer, work done outside the bargaining unit will not undermine the market for that done within. In this connection, see Taplitz, *Refusal to Bargain*, N. Y. U., *Seventh Annual Conference on Labor*, at 231; *compare*, Gregory *Labor and the Law*, (2d rev. ed., 1958) at 144.

[14] In this connection, see *NLRB, Thirteenth Annual Report* (1948), at pp. 35-36; and *NLRB, Fourteenth Annual Report*, (1949), at pp. 32-33, in which the Board points out that when determining an appropriate bargaining unit it considers many factors, only one of which is the desires of the employees. Also see *NLRB v. Pittsburgh Plate Glass Company*, 270 F. 2d 167 (4th Cir., 1959), in which the Fourth Circuit held that the Board had erred in leaving the determination of an appropriate craft unit solely up to the employees. There the Court said, 270 F. 2d at 173:

> "The Board was not authorized by the amendment to surrender to anyone else its statutory duty to determine in each case the appropriate unit for collective bargaining. It had been set up by Congress as an independent body presumed to possess expert knowledge and wisdom in the field superior to that of the courts or of Congress or of the active participants in the industrial world and therefore better fitted than anyone else to decide what would best serve the working man in his effort to bargain collectively with his employer, and what would best serve the interest of the country as a whole."

grandizement of unions at the expense of employers, and "... interpretations of the Act ought not proceed on the assumption that it actively throws its weight on the side of unionism in order to redress an assumed inequality of bargaining power."[15] In this connection the Board has expressly recognized that the prospect of increased union bargaining power has no bearing on a determination of what is an appropriate bargaining unit:[16]

---

[15] *NLRB v. Insurance Agents International*, 361 U. S. 477, 507 (1960), (separate opinion). Reflecting the same view, the opinion of the Court stated, 361 U. S. at 490:

"... Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union."

[16] *Continental Baking Co.*, 99 NLRB 777 (1952). Addressing itself to the power factor, the Board said, 99 NLRB at 782, f. n. 11:

"There are a number of objections to considering a power factor in making unit determination. In the first place, except for opinions expressed in a few early Board decisions [citing cases] ... the Board has exclusively followed a mutuality of interest test in deciding what is an appropriate unit. The relevant portion of Section 9 (b) of the Wagner Act was reenacted without substantial change in the present Act. There is not the slightest evidence that Congress intended to supplant or supplement the mutuality of interest standard with a power factor test. See Sen. Rep. No. 105, 80th Cong., 1st Sess., p. 11. Under such circumstances, it is a fair assumption that by reenacting Section 9 (b), Congress accepted the Board's mutuality of interest standard for unit determination. *N. L. R. B. v. Gullett Gin Co.*, 340 U. S. 361, *National Tube Company*, 76 NLRB 1199.

"In the second place, we do not believe that, even considering Section 9 (b) together with Section 1 of the Act, the inference is warranted that Congress intended that the Board should consider the power factor in unit determination.

"In the third place, the application of a power test would bring economic warfare to the forefront of collective bargaining, instead of keeping it in the background where it belongs.

"Finally, the Board would be faced with an impossible administrative problem in trying to decide when equality of bargaining power does or does not exist. For all these reasons, we reject the proposed power factor as a test in unit determinations."

Long ago, this Court stated in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937), that the theory of collective bargaining envisioned in the Act called for the resolution of those conflicts and differences at the bargaining table which the Act does not otherwise compel.[17] "But Congress provided, and has placed [at the union's] disposal, adequate statutory remedies [Section 9 of the National Labor Relations Act] to alleviate the pressure which [the current certifications] produce."[18] If the unions in the instant case were dissatisfied with their relative bargaining positions, their recourse was, by way of a Section 9 petition, to the Board and not to the employer at the bargaining table. As Judge Carswell declared in his dissent, 298 F. 2d at 879 (R. 220, Appendix A):

> "Industry-wide or plant-wide bargaining may well be desirable for one or the other party, or for both, but this determination can be made by the Board upon application under [§ 9] for expansion of the certified bargaining unit, reference to which is made in the Court's opinion. The problems of negotiation asserted by the bargaining unit here are made by the Court the justification for an expansion of unit authority. These contentions are more properly for consideration of the Board under [§ 9] for plant-wide

---

[17] This court declared in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 at 45, that the "theory of the Act . . . [affords] free opportunity for negotiation . . . [which] . . . may bring about the adjustments and agreements which the Act in itself does not attempt to compel." The theory of the collective bargaining process enunciated by this Court in *Jones & Laughlin, supra*, was quoted and expressly approved by Congress when it was considering the Taft-Hartley Amendments to the Act. House Rep. No. 245, *National Labor Relations Board, Legislative History of the Labor-Management Relations Act of 1947*, pp. 310-11.

[18] *Arlington Asphalt Co.*, 136 NLRB No. 67 (March 30, 1962), 49 LRRM 1831 at 1833. In this case, the Board condemned an employer's demand for a surety bond against jurisdictional disputes because, *inter alia*, Congress had expressly provided the employer another remedy to deal with such problems.

certification to remove the unit, or all of them, from an inequitable situation, if, indeed, the facts there developed require this result."

B. Administrative Problems Created by the Decision of the United States Court of Appeals for the Fifth Circuit.

The decision of the United States Court of Appeals for the Fifth Circuit creates problems of vital importance to the administration of the National Labor Relations Act. Its holding that the demand for common expiration dates is a mandatory bargaining item, if allowed to stand, would "... substantially modif[y] the collective-bargaining system provided for in the statute. ..." See *NLRB v. Borg-Warner*, 356 U. S. 342 at 350.

First, the decision will inevitably subject to the collective bargaining process a matter, i. e. the determination of the scope and extent of a bargaining unit, which is placed by the Act within the exclusive province of the National Labor Relations Board. Implicit in the Fifth Circuit's rationale is the threat that in any given case a Board certification may be ignored. Indeed, there is no logical reason why the criteria (i. e. the agreement of the unions affected and the purpose to augment bargaining power)[19] employed by the Court to justify the demand for common termination dates, would not also justify demands for common wages, common hours; or, for that matter, common collective agreements.[20] Thus, unions, by

[19] The demand for common collective agreements could be justified under the Fifth Circuit's rationale because such agreements inevitably lead to the establishment of uniform terms and conditions of employment, which brings a corresponding increase in the bargaining power of unions affected. See footnote 13, supra.

[20] Dissenting Judge Carswell recognized this possibility in the instant case when he said, 208 F. 2d at 879 (R. 220, Appendix A):

"As I see it, this so extends and confuses the separability of unit duties and responsibilities as to enshroud the process

demanding common collective agreements, would exact from the employer precisely the same objective which they were denied by the Board and the Second Circuit in *Douds v. International Longshoremen's Ass'n.*, 241 F. 2d 278 (2d Cir. 1957) and *International Longshoremen's Ass'n* (New York Shipping), 118 NLRB 1481 (1957) (i. e., the bargaining unit of their own choosing).

Second, the Fifth Circuit's decision would expand the scope of an employer's obligation to bargain to an extent not envisioned by the Act. It would compel him to negotiate, at the risk of violating Section 8 (a) (5) of the Act, with a union about the terms and conditions of employees *outside* the bargaining unit represented by the union.

Third, the decision does violence to a basic policy which permeates the Act in all its phases, i. e., the encouragement of an expeditious settlement of labor-management differences through voluntary means, for it surely serves to increase antagonisms and friction at the bargaining table. Confronted with demands for *common* concessions, employers will inevitably be compelled to take artificial positions—positions which they would not otherwise take—with respect to the terms and conditions of employment of employees represented by one union for the sole purpose of protecting their bargaining positions with respect to *other* employees in *other* units.[21]

Petitioner submits that the decision below does violence to the Act and the policies effectuated by the Courts and

---

with additional problems, which new problems themselves might just as logically be made the justification for even more expansion. Does not this mean, for example, that like demands can be made for industry-wide wages and hours by units of heretofore limited scope.

[21] For example, it may be necessary for an employer to oppose a proposed wage increase in New Jersey because competitive conditions in Alabama will not permit a similar increase in that state

the Board thereunder to an extent and in a manner which requires that this Court grant the writ prayed for herein.

CONCLUSION.

This petition presents a question of substantial importance in respect to the National Labor Relations Act which was resolved below in a manner which conflicts with prior decisions of other Courts of Appeals enunciating policies under the Act heretofore approved by this Court. Petitioner therefore respectfully submits that the question presented by this writ should be authoritatively settled by this Court and for the reasons set forth in this petition that the Writ of Certiorari should be granted.

/ Douglas Arant

DOUGLAS ARANT,
2100 Comer Building,
Birmingham 3, Alabama,

/ John J. Coleman Jr.

JOHN J. COLEMAN, JR.,
2100 Comer Building,
Birmingham 3, Alabama,
Counsel for Petitioner.

Of Counsel:
E. L. ALL,
THOMAS W. THAGARD, JR.,
WHITE, BRADLEY, ARANT, ALL & ROSE,
2100 Comer Building,
Birmingham 3, Alabama.

Certificate of Service.

I hereby certify that on this date I served a copy of the foregoing Petition for Writ of Certiorari upon each of the.

Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D. C., and the Honorable Stuart Rothman, General Counsel, National Labor Relations Board, Washington 25, D. C., by depositing a copy of same in the United States Mail, Air Mail postage prepaid, addressed to each as set forth above.

Done this 26 day of April, 1962.

/s/ John J. Coleman

John J. Coleman, Jr.,
Counsel of Record for Petitioner.

APPENDIX A.

Opinions of United States Court of Appeals For the Fifth Circuit.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 18678

United States Pipe and Foundry Company,
Petitioner,

versus

National Labor Relations Board,
Respondent.

Petition for Review of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(February 1, 1962.)

Before Rives and Wisdom, Circuit Judges, and Carswell, District Judge.

Rives, Circuit Judge: The difference between the parties is pointed up by their separate concepts of the question to be decided. The petitioner-employer submits that the issue is:

> "Whether a union, the certified representative of a plant bargaining unit may require of an employer as a condition to its agreement that its contract and

> all contracts under negotiation between the employer and other certified representatives of different bargaining units at other plants shall expire upon a common date."

The respondent-Board, on the other hand, argues that:

> ". . . where, as here, two or more unions are simultaneously negotiating separate contracts with the same employer, such unions have just as much right to insist that the contracts shall expire on the same date as the employer has to insist that they shall expire on different dates."

The original complaints were issued against the unions upon unfair labor practice charges filed by the employer to the effect that the unions refused to bargain in good faith with the employer in violation of Section 8 (b) (3) of the National Labor Relations Act, 29 U. S. C. A., § 158 (b) (3). The cases were consolidated for hearing. When the General Counsel rested his case in chief, each of the respondent unions moved to dismiss the complaint on the ground that the evidence failed to show a violation of Section 8 (b) (3). The Trial Examiner took the motions to dismiss under advisement and recessed the hearing, commenting:

> "As an aid to me in determining whether I should grant the motions, as I am inclined to do, to grant it; I would welcome from all parties their legal analysis of the issue involved here; namely whether or not it is a violation of Section 8 (b) (3) to require, *as the evidence indicates, here respondents did require*, common termination dates of contracts to and beyond the point of impasse." (Emphasis supplied.)

Subsequently, the Trial Examiner dismissed the complaint holding squarely that the demand of each of the unions for common expiration dates of all contracts was,

as a matter of law, within the realm of permissible bargaining.

The Board, in an extremely brief decision, affirmed; but, in so doing, refused to consider the ground upon which the Trial Examiner based his decision and, instead, held simply that, because contract duration is a bargainable issue, it is not an unfair labor practice for unions to insist upon specific expiration dates for their contracts.

The petitioner-employer urges that the Board's decision was based upon an erroneous conception of the facts, that this case does not involve a union demand for a specific expiration date of its contract, but, in each instance, a demand that its contract and contracts under separate negotiation with other unions expire on the same date common to all.

The two questions are not identical either legally or actually. Legally, there can be no serious debate that each union may insist upon a specific expiration date for its contract whether or not that is the same date being insisted on by another union with respect to another contract. This case demonstrates, however, that strong legal objections can be raised to a union's demand that the employer agree with it and with another union or unions for a common expiration date as to two or more contracts. Actually, in practical operation, an employer might accede to a union's request for a specific expiration date for its contract, but then adamantly, and perhaps successfully, resist the demand of another union for the same expiration date for its contract. In that event, the specific insistence of the first union would be met, but its real purpose and object would be defeated. Because we agree with the petitioner-employer that the Board did misconceive the issue to be decided, becomes necessary to detail the facts and circumstances at some length.

Petitioner-employer, a manufacturer of a number of products, including cast iron pressure pipe, owns and operates several pipe plants, including one at Burlington, New Jersey, one at Bessemer, Alabama, and one at North Birmingham in Birmingham, Alabama.

Dating back to certifications issued by the Board in 1940, the Molders[1] and its Local 256 have represented petitioner's employees at the North Birmingham plant, while the Steelworkers[2] and its Local 2140 have represented a comparable unit consisting of the employees at the Bessemer plant, excluding, however, several craft groups which are represented by other unions. Acting through other locals, the Steelworkers also represents employees of petitioner at various other establishments, including a plant at Burlington, New Jersey, where the Steelworkers obtained a certification in 1942.[3]

In 1959, the Steelworkers had contracts at the Burlington and Bessemer plants which were due to expire 70 days apart—August 20 at Burlington and October 31 at Bessemer. At the Burlington plant, the parties failed to reach agreement as to the terms of a new contract and the Steelworkers called a strike on or about August 20 when the old contract expired. A few days after that, the Steelworkers started negotiating with management representatives at Bessemer. Here, again, an impasse developed and, as the old contract expired, the Union called a strike commencing October 31.

---

[1] International Molders and Foundry Workers of North America, AFL-CIO.

[2] United Steelworkers of America, AFL-CIO.

[3] Steelworkers Local Union 2026 representing the employees at the Burlington plant is not in the geographic area comprising the Tenth Region of the Board and was not named as a party to this case.

At North Birmingham, meanwhile, petitioner had been operating under a comparatively new contract with the Molders, which went into effect on June 1, 1959. That agreement was not due to expire until July 31, 1960, but it contained a "reopening" provision and, pursuant thereto, the Molders served notice on November 2 that its members desired to renegotiate certain matters. The parties accordingly started bargaining at that plant about mid-November, but failed to reach agreement, and the Molders called a strike beginning January 26, 1960.

We have carefully read and studied the record of negotiations at Bessemer between the petitioner and Steelworkers and those at North Birmingham between petitioner and the Molders. It would unduly prolong this opinion to set out those negotiations at length. Suffice it to say that we agree with the Trial Examiner on his characterization of the issue. The Steelworkers did suggest contract expiration dates of May 1 or June 1, but those suggestions were for adoption of a *common* date for *all* three contracts.[4] The Molders' suggestion of a particular date was

---

[4] E. g., the following from the meeting of February 16, 1960:

"Yates (Representing Steelworkers)—We would like to have a three year contract—have it May 1, 1963.

"Nolan (Representing employer)—That would be more than three years.

"Yates—As long as we get a common expiration date we will not argue too much about that.

"Nolan—You mean North Birmingham, Bessemer and Burlington all must expire on the same day?

"Yates—That is right.

"Nolan—I have told you many times before I don't bargain for those plants. I only bargain for Local 2140. I cannot bargain for North Birmingham or Burlington plants.

"Yates—Well then you are going to have to get somebody who can.

"Nolan—I can only negotiate with you for a contract for Local 2140.

"Yates—You all had better get your heads together then.

"Morris (Representing Steelworkers)—On common expiration date—I am sure those officials have the knowledge of

likewise conditioned upon acceptance by the employer of that date for all three contracts.[5]

[5] According to the testimony of Horn, who represented the employer, and whose testimony was not disputed:

"A. Well, we proposed a January 20th expiration date. The union has asked for a May 1st expiration date. Mr. Roberts, on that occasion, proposed a July 31st expiration date. Mr. W. T. Murray, Corresponding Representative of the union, who was present at that meeting, made a statement to the effect that a July 31st expiration date would be satisfactory with the union, provided the Burlington and Bessemer contracts were dated that same date."

common expiration date being an important issue with all unions. I wonder if you are in position to say what the company would do. We are only trying to put the common expiration date in where we can cut down the problems that exist. Should the company agree to grant that common expiration date there won't be any longer problems in the next three years. If they do or don't I can't see where it would harm the company.

• • • • •

"Roberts (Commissioner, Federal Mediation & Conciliation Service)—On this expiration date. Say the contract expires two years from the date it is signed. That would be a problem to be handled in each negotiation, but it would be up to the others to get their expiration date. We have to start somewhere.

"Yates—That is what we have been trying to get them to agree to do.

"Roberts—You say May 1st. The Company says November 1st.

"Nolan—Even if it was today, February 16th, Mr. Yates said it must be Birmingham, Burlington and Bessemer, all at the same time.

"Yates—Yes—that is part of our demands. A common expiration date.

"Nolan—By common, you mean the North Birmingham and Burlington plants must be the same as Bessemer. Even May 62 or 63.

"Yates—Yes.

"Roberts—I really think for union purposes, even if it was 30 or 60 days apart, that would be alright (sic).

"Yates—I don't think that would answer the purpose.

"Roberts—I am thinking of something that could be lived with—not a utopia.

"Yates—It ain't gonna cost the company a dime—they work one union against the other—it has caused all these strikes and that is the only way we know to avert these strikes. When we have a strike at Bessemer they operate in Birming-

At the risk of repetition, we restate the question presented by the practically undisputed facts, viz.: whether

---

ham—they do the same thing in Burlington. It would be for the benefit of all concerned if we could get a common expiration date. I think we have a good reason for it. We have all agreed to it and that is what we are striving for."

See also the following from the meeting of March 23, 1960:

"Yates: We think if you give us a common expiration date on these contracts we will have no more trouble.

"Nolan: I will go back to my same story. I have nothing to do with any plant except the Bessemer plant. I could not negotiate an expiration date for Burlington or Birmingham.

"Farr (Representing Steelworkers): What is your thought if we were to reach agreement.

"Nolan: I will put it like this. We have pretty well followed steel. Steel expires June 30th. We would like to have our contracts expire November 1, 1961 or November 1, 1962, which would be the same expiration date we have had. Burlington is August 20th and there could not be but two months and a few days—that is not too great a difference.

"Farr: If I understood Mr. Lawson right, he said his desires would be that all union contracts expire on the same date in the same plants. Is that your thinking?

"Nolan: Yes. All of our contracts expire on November 1st. The strange thing about it, I have signed with three unions whose contracts expire November 1, 1961. Sometimes you say you don't pay too much attention to other unions, but you are concerned about them, because they do effect your welfare.

"Farr: We realize that any craft working in the plant could shut the plant down.

"Nolan: That is right. We have to consider them. We have the Machinists and Boilermakers and your group who have not signed.

"Yates: Yes and any one of them could strike you. We do not want to go back to November—I don't.

"Nolan: Steel expires on the same date they had with no change in the expiration date. We have followed steel pretty well throughout.

"Nolan: Mr. Farr, is a common expiration date still a major issue?

"Farr: Unless you are willing to concede.

"Nolan: I have no authority to bargain with you for any other union than Local 2140. I was hoping we could get that out of the way. As we said before, I have no authority to negotiate a common expiration date.

"Farr: Let's just make all of them June 1st and strike in the summer time (sic)."

by prearrangement among themselves, each of three unions, certified representatives of three separate plant bargaining units, simultaneously negotiating separate contracts with the same employer, may insist as a condition to its agreement that all three contracts under negotiation shall expire on some common date.

The scope of mandatory bargaining is limited to "wages, hours, and other terms and conditions of employment."[6] Within that scope, the employer and the representative of the employees must bargain or be guilty of an unfair labor practice. Section 8 (b) (3) of the Act. A further limitation of the scope of mandatory bargaining is implicit in the authority of the Board to decide upon the appropriate bargaining unit, and in each union's position as the exclusive representative of all employees in such unit:

29 U. S. C. A., § 159 (a):

> "§ 159. *Representatives and elections—(a) Exclusive representatives; employees' adjustment of grievances directly with employer*
>
> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ."

29 U. S. C. A., § 159 (b):

> "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this sub-chapter, the unit appropriate for the purposes of collective

---

[6] See 8 (d) of the Act, 29 U. S. C. A., § 158 (d); Labor Board v. Borg-Warner Corp., 1958, 356 U. S. 342, 348, 349.

bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . ."

Under varying facts and circumstances, it has been often held that a proposal to expand the scope of the bargaining unit itself is not within the area of mandatory bargaining.[7]

Under the facts of this case viewed realistically, a common expiration date of all three contracts had a vitally important connection with the "wages, hours and other terms and conditions of employment" of the employees at each plant. Without a common expiration date, any union striking for a new contract on a different date, might have to "bail with a sieve" while the employer shifted its production activities to the other plant or plants. With a common expiration date, it is obvious that each union might be able to negotiate a more advantageous new contract for the employees represented by that union.

None of the cases applying the provisions of the Act,[8] which limit a union representation to one particular unit, deal with the situation where the representatives of employees in several plant units of the same employer agree on a demand and are concurrently making the same demand in their several negotiations. Nor do any of those cases deal with the situation where the proposal seriously affects the ability of each union to bargain.

---

[7] International Brotherhood of Electrical Workers (Texlite), 119 NLRB 1792, enf'd per curiam, 266 F. 2d 349 (C. A. 5); Painters Union (Cheatham Painting Company), 120 NLRB 907; International Union of Electrical, etc. Workers v. NLRB, 3 Cir., 1959, 273 F. 2d 243; International Brotherhood of Longshoremen (Chicago Stevedoring), 125 NLRB 61, enf'd in part 280 F. 2d 661 (C. A. 7). Compare, Machinists Local Lodge 1424 v. Labor Board (Bryan Mfg. Co.), 1960, 362 U. S. 411, 414, n. 3, and International Ladies' Garment Workers' Union v. Labor Board, 1961, 366 U. S. 731.

[8] 29 U. S. C. A. § 159 (a) and (b), quoted in pertinent part, *supra*, and cases cited in n. 7, *supra*.

In such a situation, as presented by the facts and circumstances of this case, it seems to us that the importance of collective bargaining on questions affecting "wages, hours and other terms and conditions of employment" overrides the *apparent* expansion of the scope of the bar aining unit. That expansion is more apparent that read, for the very real, hard problem faced by each of the three unions, acting as the exclusive representative of the employees in its unit, is that a common expiration date for all three contracts vitally affects the ability of each union separately to bargain.

Concededly, there is no legal obstacle to the right of the petitioner-employer to insist adamantly that the three contracts continue to expire on different dates. Correspondingly, we think, there is no valid legal reason why each union, with the consent of the other unions, cannot insist just as adamantly that all three contracts expire on some common date. In our opinion, the Board's order, as distinguished from its reasoning, is correct. The petition for review is therefore

Denied.

Carswell, District Judge Dissenting:

Because I cannot agree that the action of the Union here was only *apparently* beyond the scope of bargaining units as set forth in 29 U. S. C. 159 (a), respectfully I must dissent.

The course of negotiations between the parties, concisely set forth in the Court's opinion, mean to me an unequivocal attempt by one bargaining unit to compel a contract expiration date for other and distinct bargaining units on other contracts as a *condition* of contract between this unit and this employer.

This, basically, is the position petitioner-employer has maintained throughout negotiation, hearing before the Board, and on this appeal. Its quest for answer has been once again without avail. I agree with the Court that the Board based its decision against petitioner-employer on the erroneous assumption that the issue before it could be met by simply reaffirming the unquestioned but irrelevant proposition that contract duration is a bargainable issue. Indeed, as the Court says, there can be no serious legal debate that each unit may insist upon a specific expiration date for its own contract, whether or not it be the same date insisted upon by another unit. But the emphasis supplied to this statement points up our basic disagreement. This does not mean to me that a distinct entity, here a bargaining unit deriving legal being from the enactment of the Taft-Hartley Act and having in 29 U. S. C. 159 (a) a plain limitation of scope, may inject as a *condition precedent* in the process of negotiation matters with reference to other units and involving other contracts.

As stated by the Supreme Court in *National Labor Relations Board v. Wooster Division of Borg-Warner Corp.*, 356 U. S. 342:

> "The company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow

> that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement."

Among the salutary purposes sought by the enactment of the Taft-Hartley amendments was a refinement of stated rules to delineate the employee-employer relationships not the least of which was to make the compulsory negotiation process itself subject to some standard of relevancy to the vital issues between conferees. In the first decision by the Supreme Court under the progenitor Wagner Act it was stated:

> "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45.

"Wages, hours, and other forms and conditions of employment" are made mandatory subjects of negotiation. 29 U. S. C. 158 (d). The area of permissive negotiation is much more broad and by *consent* of the parties may be expanded to include many things including common expiration dates on other contracts with other units as sought by the Union here. But such is not this case.

It is not a specific date, as such, which is the subject of controversy here, but a demand by separate bargaining units, having no authority to bargain for each other, as condition precedent to an agreement for all. The Court here finds that the common expiration date "vitally affects the ability of each union separately to bargain," stating that the separate unions face a "very real, hard problem" in this regard. Its preoccupation and concern with the respective difficulties of the parties at bargaining have fashioned, it

seems to me, a new microscope of legal detection to see that which is and that which is not apparently visible in the Congressional language of 29 U. S. C. 159 (a). As I see it, this so extends and confuses the separability of unit duties and responsibilities as to enshroud the process with additional problems, which new problems themselves might just as logically be made the justification for even more expansion. Does not this mean, for example, that like demand can be made for industry-wide wages and hours by units of heretofore limited scope or that employer demand as condition to agreement same wages as paid to other units?

Industry-wide or plant-wide bargaining may well be desirable for one or the other party, or for both, but this determination can be made by the Board upon application under 29 U. S. C. 159 (b) for expansion of the certified bargaining unit, reference to which is made in the Court's opinion. The problems of negotiation asserted by the bargaining unit here are made by the Court the justification for an expansion of unit authority. These contentions are more properly for consideration of the Board under Section 159 (b), supra, for plant-wide certification to remove the unit, or all of them, from an inequitable situation, if, indeed, the facts there developed require this result. Under the holding here in Court, in effect, is approving joint negotiation without consent of the parties and without plenary proceedings before the Board for determination of the need or desirability of such joint negotiation.

Moreover, the Union's claim that its demand for common expiration date was precipitated and made necessary by the action of the company in shifting its operations between (its three) plants should and could more properly have been the subject of a complaint for unfair labor practice under 29 U. S. C., Sections 158 (b) (3). See also *National Labor Relations Board v. Hopwood Retinning Co., Inc., et al.*, 98 F. 2d 97 (2nd Cir. 1938); *United Steelworkers of*

America (AFL-CIO), Local Union No. 4264 v. New Park Mining Company, 273 F. 2d 352 (10th Cir. 1959); *National Labor Relations Board v. Almo White Truck Service, Inc.*, 273 F. 2d 238 (5th Cir. 1959).

Thus the Union was not without clear and appropriate recourse to seek directly joint bargaining by broadened certification or by bringing the petitioner-employer before the Board for a full hearing on the merits of its complaint that its shifting work must cease and desist as an unfair labor practice under Section 8 (b) (3). Instead, the motivation of the Union in this case has been made the basis of the Court's opinion denying petitioner-employer hearing on either proposition and this despite the fact that petitioner-employer's query as to whether or not each unit must bargain for itself has not been directly answered by the trial examiner, the Board or the Court.

With great deference for the views of the majority, for the foregoing reasons I would answer petitioner-employer here by holding the action of the bargaining unit a refusal to bargain in good faith. I must, therefore, respectfully dissent.

APPENDIX B.

Decision and Order of the National Labor Relations Board.

United States of America, Before the National Labor Relations Board.

United Steelworkers of America, AFL-CIO, and Local Union 2140, United Steelworkers of America, AFL-CIO,

and Case No. 10-CB-1205.

International Molders and Foundry Workers of North America, AFL-CIO and Local Union 256 International Molders and Foundry Workers Union of North America, AFL-CIO,

and Case No. 10-CB-1206.

United States Pipe and Foundry Company.

On May 26, 1960, Trial Examiner Thomas F. Maher issued his Order on Motions to Dismiss in the above-entitled proceedings, granting the Respondent's Motion to Dismiss on the ground that the General Counsel had failed to establish a prima facie case, and dismissing the consolidated complaint in its entirety, as set forth in the copy of the Order attached hereto. Thereafter, the charging Company filed exceptions to the Order and a supporting brief, in effect appealing the Trial Examiner's Order and requesting that the hearing be reopened for the presentation of the Respondent's defense.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudi-

cial error was committed. The rulings are hereby affirmed. The Board has considered and reviewed the Trial Examiner's Order, considered the exceptions and the brief, and the entire record in these cases. The Board finds no merit in the exceptions and the request to reopen the hearing, and hereby denies the charging Company's appeal of the Trial Examiner's Order.[1]

Order.

It Is Hereby Ordered that the Trial Examiner's Order dismissing the consolidated complaint in its entirety be, and it hereby is, sustained on appeal.

Dated, Washington, D. C. Oct. 11, 1960.

Boyd Leedom,
Chairman,

Philip Roy Rodgers,
Member,

John H. Fanning,
Member,

(Seal) National Labor Relations Board.

---

[1] The consolidated complaint alleges that the Respondent Unions violated Section 8 (b) (3) of the Act by failing to bargain in good faith. The complaint's gravamen is the insistence of Respondent Unions for a common expiration date of their contracts covering the employees in two of the charging Company's plants represented by them and in a third of the Company's plants represented by another labor organization. We agree with the Trial Examiner's conclusion, that contract duration is a bargainable issue, that the insistence of the Respondent Unions' on specific expiration dates was not evidence of bad-faith bargaining, and that the General Counsel has failed to establish a *prima facie* case. We find it, therefore, unnecessary to consider the merits of, or to adopt the Trial Examiner's discussions concerning the impact, or the lack of impact, of the Respondent Unions' contract termination demands on the scope of the certified single plant units herein involved.

APPENDIX C.

Intermediate Report of the Trial Examiner.

Before: Thomas F. Maher, Trial Examiner.

Order on Motions to Dismiss.

Preliminary Statement.

Upon charges filed by United States Pipe and Foundry Company herein referred to as the Company, the General Counsel of the National Labor Relations Board issued a consolidated complaint against United Steelworkers of America, AFL-CIO, Local Union 2140, United Steelworkers of America, AFL-CIO, International Molders and Foundry Workers Union of North America, AFL-CIO and Local Union 256, International Molders and Foundry Workers Union of North America, AFL-CIO, referred to hereinafter as Respondent Steelworkers and Respondent Molders, respectively, alleging violations of Section 8 (b) (3) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519) herein referred to as the Act. In their duly filed answers both Respondents, while admitting certain allegations of the complaint, denied the commission of any unfair labor practice.

Pursuant to notice a hearing was held before me at Birmingham, Alabama, on May 4, 1960. All parties were represented at the hearing and were offered full opportunity to be heard. Counsel for the General Counsel presented his case-in-chief, with full opportunity to Respondents' counsel to cross-examine witnesses. Upon the conclusion of General Counsel's complaint herein on the ground that upon the record made the General Counsel had failed to establish a violation of the Act. Because I entertained serious doubt that the General Counsel had established a prima facie violation of the Act, and in deference to Respondents' rights in due process not to be

required to enter their defense in the absence of such a showing, I adjourned the hearing for an indefinite period and requested briefs of the parties directed to the substance of Respondents' motion.

Upon consideration of the legal arguments advanced by the parties and a review of the record made by the General Counsel in support of the allegations of the complaint in which I assume, of necessity, the truth of all the evidence before me, I make the following:

Findings and Conclusions.

I. The Company's Operations.

United States Pipe and Foundry Company is a New Jersey corporation doing business in the State of Alabama, with its principal office and place of business located at Birmingham, Alabama. It operates plants in Alabama, including one at Bessemer and another at North Birmingham (both of which are involved in the instant dispute), and in Tennessee, California and New Jersey, including a plant at Burlington, New Jersey, which is frequently referred to herein in connection with the issues presented.

At the foregoing plants the Company is engaged in the manufacture of cast iron pipe and pipe fittings, and related products. Annual sales and shipments directly outside the State of Alabama exceed $1,000,000 in value. All parties stipulate that the Company is engaged in commerce within the meaning of the Act, and I so find.

II. The Labor Organization Involved.

The Respondents Steelworkers and Molders are labor organizations within the meaning of Section 2 (5) of the Act.

Local 2140 of the Steelworkers is the representative of the production and maintenance employees, with certain

specified exclusions, at the Company's Bessemer, Alabama, plant, pursuant to Board certification in Case No. R-1651. Local 256 of the Molders is the representative of the production and maintenance employees, with certain specified exclusions, at the Company's North Birmingham plant, pursuant to Board certification in Case No. 10-RC-556. Local 2026 of the Steelworkers, another labor organization whose relations with the Company are significant to the issues raised herein, is the representative of production and maintenance employees at the Company's Burlington, New Jersey, plant, pursuant to Board certification in Case No. 4-RC-988.

III. Pertinent Facts.

Negotiations for the renewal of the contract between the Company and the Steelworkers covering employees at the Bessemer plant began August 23, 1959; similar negotiations between the Company and the Molders in behalf of employees at the North Birmingham plant began November 18, 1959. During this same period separate negotiations were taking place at the Burlington, New Jersey, plant between representatives of the Company and Local 2026 of the Steelworkers.

Upon failure of the parties to reach agreement by October 31, 1959, the expiration date of the contract, employees at the Bessemer plant represented by the Steelworkers went on strike and continue to strike as of the date of the hearing. The Company's agreement with the Molders for the North Birmingham employees would not have expired until July 31, 1960, but, pursuant to the terms of a reopening provision, negotiations began in November, and the employees, after giving due notice under the terms of the contract and Section 8 (d) of the Act, struck on January 26, 1960, upon the failure of the parties to reach an agreement. The strike continued through the hearing.

The character of the bargaining sessions between the Company and the Steelworkers was adequately described in the voluminous minutes taken at the time, a portion of which was incorporated in the record. Thus wage rates at the Bessemer plant and a comparison of the rates at other plants, including the Burlington and North Birmingham plants, was a matter of constant discussion and negotiation. Insurance benefits, hospitalization, pensions, cost-of-living increases, job classification and vacations were likewise the subject of negotiation and comparisons of such benefits as were in force in the Burlington and North Birmingham plants were frequently made. Included among the items considered and listed by the parties as a critical issue was the Steelworkers' demand for a contract at Bessemer whose termination date would coincide with termination dates of contracts between the Company and the Steelworkers at Burlington, and between the Company and the Molders at the North Birmingham plant. At the hearing Ashley B. Nolan, the Company's personnel manager at Bessemer voiced the Company's unwillingness to accept coterminous contracts and stated that he "sure won't" change from the October 31st termination date urged by the Company.

Contemporaneously with the Bessemer negotiations, Company and Molder representatives negotiated in behalf of employees at the North Birmingham plant. As noted above, the contract between these parties was reopened on November 2, 1959. From the beginning of negotiations until the date of the hearing some 14 or 15 meetings were held, wages were discussed, and upon failure to reach an agreement, a strike of the North Birmingham employees was called on January 26. The strike is still in effect.

In the course of negotiations on January 19, representatives of the Molders informed Company representatives of their demand for a contract termination date coinciding with contracts at Bessemer and Burlington; and the de-

mand was repeated at the February 8 negotiations, after the strike had been called. Since that date the subject of common expiration dates has been a continuing demand, with representatives of the Molders urging it as late as April 18. Throughout these negotiations Personnel Manager Horn, the Company representative, made it clear that the Company, as at Bessemer, would not accede to such a demand.

IV. The Theory of the Complaint.

The complaint offers no clue to the nature of the violation alleged, stating only that beginning on specified dates the respective Respondents "have refused, and have continued to refuse, to bargain in good faith." In his opening statement counsel for the General Counsel elaborated thus:

> The theory of the General Counsel is that in the course of the negotiations the unions have refused to bargain within the meaning and intent of Section 8 (d) of the Act, by insisting as a condition precedent to the signing of any agreement that there must exist a common expiration date of contracts signed at its [Bessemer, North Birmingham and Burlington plants]. This demand is made, even though the employees of each of the Company's three plants are encompassed in separate certified bargaining units.

V. Analysis and Conclusions.

No one questions the basic proposition that the duration of a contract is a bargainable issue. [1]The Board has likewise included it among those Mandatory subject for bargaining designated by the Supreme Court in the Borg-Warner case[2] as those on which "neither party is legally

---

[1] *Hinde & Dauche Paper Co.*, 104 NLRB 847; *Lloyd A. Fry Roofing Co.*, 123 NLRB No. 86.

[2] *N. L. R. B. v. Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342, 349.

obligated to yield." Thus the Board states that "the term of a contract, like its substantive terms, is a bargainable matter." Because it is these "substantive terms" to which the Supreme Court referred in describing "subjects of mandatory bargaining," the Board's reference can have no other meaning. The theory of the General Counsel here, however, is that such an issue must be considered in a vacuum, without relation to externals. Thus he would say that at the bargaining table for either of the contracts a termination date could be discussed ad infinitum, but the moment the discussion impinged upon the outcome of the other contract negotiation it becomes tainted. I know of no rule of law that supports this restriction upon collective bargaining.

In his opening statement to me counsel suggests that while it is permissible to bargain on such matters within the confines of one certified bargaining unit, the forcing of a company to bargain on a subject which pertains to another unit would amount to a usurpation of the Board's authority to designate certified units. The Board, however, is not as fearsome of such intrusions. Thus in General Motors Corp., 120 NLRB 1215, severance from certified bargaining units was sought by a number of unions representing the company's craft employees and the Board was called upon to review its earlier certifications and to assess what effect a history of multiplant and industrywide bargaining would have upon previously established single-plant units. The Board stated that it "has frequently held that bargaining of this type, which obliterates the previously existing units based on Board certifications is a permissible avenue for the course of labor-management relations," citing Owens-Illinois Glass Co., 108 NLRB 947. Certainly if the Board sees no evil in a form of bargaining that effectively obliterates individual bargaining units, it

[illegible] (emphasis supplied).

is difficult to see how the mere relating of common problems and issues of individual bargaining units, as here, would be received with less favor. Nor am I impressed by General Counsel's principal argument that Respondents seek to destroy the established bargaining units and institute companywide bargaining. Followed to its logical conclusion this theory would render illegal any attempt at "pattern bargaining" whereby many industries (including the steel industry, as indicated by the wage discussions in evidence here) adopt a practice of following the leader and framing their contracts accordingly.[2] Because, therefore, General Counsel's argument proves far too much, I would conclude that the Respondents' demands for common contract termination dates would have no effect upon the certified status of the bargaining unit involved.

With respect to the larger question, the alleged bad faith demonstrated by Respondents' demands for a common termination date, I am disturbed by the inequities which flow from the Company's complaint. In effect, if not in fact, it claims to be victimized by the Molders' and Steelworkers' intransigence but at a time and on a subject matter that it admittedly refuses to budge an inch. It is difficult, therefore, to see ill in a termination demand

---

[2] In support of its position that Respondents seek to destroy the bargaining units, General Counsel cites the following cases: *International Longshoremen's Association*, 118 NLRB 1481, 1483; *Westinghouse Electric Corp.*, 122 NLRB 1364, 1367-68; *Industrial Rayon Inc.*, 102 NLRB 809, 812-813; *Comfort Slipper Corp.*, 111 NLRB 188, 190, fn. 8; *Local 69 International Brotherhood of Longshoremen, AFL-CIO*, 125 NLRB No. 1; *Textile Inc.*, 119 NLRB 1727; *International Typographical Union (Hartford Gazette Co.)*, 124 NLRB No. 97; *Local 163, Brotherhood of Painters, CIO (Chatham Painting Co.)*, 129 NLRB No. 111. A study of these cases indicate that in every case it was an enlargement or alteration of the scope and composition of a bargaining unit that was involved. This has no relevance to the stipulating of contract termination dates at issue here.

[2] The testimony of Personnel Manager [illegible] Mr. [illegible]

that the complaining party rejects by insistence upon its own demand.

Apart from the foregoing inconsistent interpretation of criteria for good and bad faith dealings I view the subject matter herein to be clearly controlled by the Supreme Court's caution that collective bargaining is a function of the parties to be resolved by them without outside interference.[6] Bad faith bargaining is that conduct in which a party engages when it has no real desire nor intent to reach an agreement. The facts supplied by General Counsel, however, provide ample evidence that an agreement was the objective of all parties. Under such circumstances it is not the function of the Board to dictate the manner in which, or the extent to which this objective is to be achieved.[7]

Upon consideration of the entire record herein, the briefs and arguments of the parties and the foregoing findings and conclusions,

It Is Hereby Ordered, pursuant to Sections 102.25 and 102.35 (h) [8] of the Board's Rules and Regulations, Series 8, that Respondents' respective Motions to Dismiss the complaint be granted, and that the complaint be accordingly dismissed in its entirety.

Dated at Washington, D. C., this 26th day of May 1960.

Thomas F. Maher,
(Thomas F. Maher),
Trial Examiner.

---

[6] *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395, 404; *N. L. R. B. v. Insurance Agents' International Union, AFL-CIO*, U. S. ...., 80 S. Ct. 419.

[7] *N. L. R. B. v. Insurance Agents' International Union, supra* at 432.

[8] See *Cherry Rivet Co.*, 97 NLRB 1303, fn. 1.

APPENDIX D.

Statutes Involved.

National Labor Relations Act, as amended, Section 8, 61 Stat. 140 (1947) [29 U. S. C., § 158]:

"* * * (b) It shall be an unfair labor practice for a labor organization or its agents— * * * (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of § 9 (a) * * *."

National Labor Relations Act as amended, Section 9, 61 Stat. 143 (1947) [29 U. S. C., § 159]:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *."

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *."

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and